

SETTLEMENT AGREEMENT BETWEEN THE U.S. ENVIRONMENTAL PROTECTION AGENCY, REGION 10, AND THE CITY OF TACOMA

Whereas, on March 3, 2003, a consent decree was entered by the United States District Court in the case of United States v. Atlantic Richfield Co., et al., Civil No. C03-5117 (W.D. Wash.) (Consent Decree), setting out, among other things, certain obligations of the City of Tacoma (City) to perform specified response actions addressing releases and threatened releases of hazardous substances in the Thea Foss and Wheeler-Osgood Waterways of Commencement Bay Superfund Site pursuant to Section 106 of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § 9606 (Response Actions).

Whereas, Lori Cohen, Associate Director, Office of Environmental Cleanup, U.S. Environmental Protection Agency (EPA) Region 10, sent a letter dated February 8, 2007, to William Pugh, Public Works Department, City of Tacoma. Among other things, the letter alleged that the City had violated certain deadlines for the Response Actions and demanded the payment of a penalty for the alleged violations.

Whereas, William Pugh from the City sent a letter dated March 8, 2007, to Lori Cohen, EPA Region 10. Among other things, the letter disputed the amount of the penalty.

Whereas, EPA Region 10 has the authority to settle this matter pursuant to Paragraph 72 of the Consent Decree.

Whereas, EPA Region 10 and the City believe that a settlement is in the interest of the parties and is in the public interest.

Whereas, on December 30, 1997, a consent decree was entered by the United States District Court in the case of United States, et al. v. City of Tacoma and the Tacoma Public Utility, Civil No. C97-5336 (W.D. Wash.) (NRD Consent Decree), in which the City agreed to perform a number of natural resource habitat restoration projects to address natural resource damages caused by releases of hazardous substances in the Commencement Bay and Puyallup River estuary. The City has specific obligations, subject to fixed expenditure limits, to perform stewardship, maintenance and monitoring of restored natural resource habitat areas that expire five years after project construction. For two of the projects, the City has no remaining stewardship, maintenance and monitoring obligations under the NRD Consent Decree. For the remaining projects, the stewardship, maintenance and monitoring obligations are identifiable and can be distinguished from obligations imposed under other authorities.

Whereas, the Commencement Bay Natural Resource Trustees have developed additional habitat restoration projects in the Commencement Bay area that require long-term stewardship, maintenance and monitoring and for which no party (including the City) has any ongoing stewardship obligations.

Whereas, as described herein, the City is willing to perform an environmental project related to the restored natural resource habitat areas to settle this matter.

Whereas, the National Oceanic and Atmospheric Administration (NOAA) supports and agrees to oversee the City's proposed project.

TERMS AND CONDITIONS OF THE SETTLEMENT

EPA Region 10 and the City agree to resolve the penalty claim for the alleged violations as follows:

1. **Parties.** This Settlement Agreement shall apply and be binding upon EPA and the City, and their officers, directors, employees, successors and assigns.
2. **Waiver.** The City hereby waives its rights to any judicial or administrative proceedings on any issues of law or fact related to the violations described in EPA's February 8, 2007, letter.
3. **Penalty.** No more than thirty (30) days after the date of execution of this Settlement Agreement by EPA, the City shall pay a penalty in the amount of \$89,500 in accordance with the procedures set forth in Paragraph 78 of the Consent Decree. However, the payment shall be sent to the following address:

US Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
PO Box 979077
St. Louis, MO 63197-9000

The City shall send copies of this check to the following two places:

Kelly Cole
Assistant Regional Counsel
Office of Regional Counsel
EPA Region 10
1200 Sixth Avenue, Suite 900
Mail Stop ORC-158
Seattle, WA 98101.

EPA Finance Center
MS-NWD
Cincinnati, OH 45268

4. **Environmental Project.** The City shall undertake an Environmental Project which will consist of stewardship, maintenance and monitoring activities related to certain natural resource habitat restoration projects that were developed by the City as part of the NRD Consent Decree, by other parties under separate settlement agreements or by the Commencement Bay Natural Resource Trustees using funds obtained in settlement agreements with other parties. The specific activities associated with the Environmental Project will consist solely of activities

distinct from and in addition to any obligations the City may have under the NRD Consent Decree, applicable permits or other legal authority and will be described in more detail in the Environmental Project Statement of Work, required under Paragraph 7, below.

5. **Escrow Account.** No more than thirty (30) days after the date of execution of this Settlement Agreement by EPA, the City shall submit a check for \$268,500 to the Escrow Account that is described in the Escrow Agreement at Attachment 1 to this Settlement Agreement.

The City shall send a copy of this check to:

Kelly Cole
Assistant Regional Counsel
Office of Regional Counsel
EPA Region 10
1200 Sixth Avenue, Suite 900
Mail Stop ORC-158
Seattle, WA 98101.

6. **Oversight Costs Payment.** No more than thirty (30) days after the date of execution of this Settlement Agreement by NOAA, the City shall submit a check for \$30,000 to NOAA. Payment shall be made per instructions provided by NOAA upon execution of this Settlement Agreement. The funds so provided together with any interest accrued on the balance in the Escrow Account shall be used by NOAA for project oversight costs.

7. **Environmental Project Statement of Work.** Based on the Scope of Work at Attachment 2 to this Agreement, the City and NOAA shall develop, subject to NOAA's approval, an annual statement of work (Annual SOW) for the City that will describe the stewardship, maintenance and monitoring work the City shall perform at the habitat sites each year. Consistent with the Scope of Work, the Annual SOW will set forth the environmental objectives to be achieved at these sites and will also enumerate and discuss the types of project expenses that may be considered Reimbursable Expenses, as that term is defined in Paragraph 11, below.

8. **Annual Report.** In accordance with the schedule set forth in the Annual SOW, the City shall submit an Annual Report to NOAA and EPA documenting the work it performed that year and the environmental benefits resulting from such work. In its Annual Report, the City shall identify its project expenses for that year, including identification of those expenses the City considers to be Reimbursable Expenses, as that term is defined in Paragraph 11, below. The City shall also provide Acceptable Documentation of its Reimbursable Expenses as defined in Paragraph 12 below.

9. **Completion Report.** The City shall also submit a Completion Report to NOAA and EPA containing a detailed description of the final Environmental Project as implemented; a description of any problems encountered and the solutions thereto; itemized costs; certification that the Environmental Project has been fully implemented pursuant to the provisions of this

Settlement Agreement; and a description of the environmental benefits resulting from implementation of the Environmental Project.

10. **Reimbursement Procedures.** If NOAA determines that the City's restoration work that year has been satisfactory and in accordance with the Annual SOW, and that environmental objectives have been achieved, the City shall be reimbursed for all Reimbursable Expenses, as that term is defined in Paragraph 11, below. Reimbursement to the City shall be made from the Escrow Account and in accordance with the Escrow Agreement at Attachment 1 to this Settlement Agreement.

11. **Reimbursable Expenses.** In itemizing its project costs in the Annual Report, the City shall also identify and provide Acceptable Documentation, pursuant to Paragraph 12 below, for all Reimbursable Expenses. Reimbursable Expenses include all project expenses that are necessary to perform the work described in the Annual SOW and that are not otherwise ineligible under Paragraph 13 below. For example, Reimbursable Expenses might include the costs of labor, rental equipment, and plantings. Where the Annual Report includes costs that are not eligible for reimbursement, those costs must be clearly identified as such.

12. **Acceptable Documentation.** Acceptable Documentation means invoices, purchase orders, or other documents that specifically identify and itemize the individual costs of the goods purchased and/or services performed for which reimbursement is requested, together with proof that the costs were actually paid by the City. Canceled drafts do not constitute Acceptable Documentation, except as proof of payment.

13. **Project Expenses Ineligible for Reimbursement.** NOAA and/or EPA may determine that certain project expenses incurred by the City are not eligible for reimbursement. For example, if any of the City's project expenses relate to work performed at habitat sites where the City or any other party to the NRD Consent Decree may have existing NRDA stewardship obligations, these expenses will not be considered Reimbursable Expenses. In addition, any expenses related to work performed by the City that are customary ownership costs will not be considered Reimbursable Expenses. In addition, any expenses related to work performed by the City that it is required to perform under applicable law or pursuant to contract, agreement or otherwise, will not be considered Reimbursable Expenses. General overhead or indirect costs of the City will not be considered Reimbursable Expenses; however, the cost to the City of City staff labor to perform the work, including partially loaded labor rates (which will include an average factor for taxes, benefits, etc. but excludes non-productive time), will be considered Reimbursable Expenses; provided, however, that the costs for project management, reporting, and documentation activities (Tasks 1 and 2 of the Scope of Work, Attachment 2) will not exceed 11% of the \$268,500 total project expenditure. Each Annual Report will document the relative percentage of Task 1 and 2 expenditures on an annual and project-to-date basis.

14. **Right to Inspect.** NOAA and/or EPA, their contractors or other authorized representatives, may inspect the habitat restoration sites during reasonable business hours to confirm completion of the Environmental Project in conformity with this Settlement Agreement, the Annual SOWs, the Completion Report, and the Annual Reports, or for any other reason.

15. **Payment Provisions.** In the event that payments required by Paragraphs 3 and 5 are not made in the time required: (1) this Settlement Agreement becomes null and void, and (2) the City shall submit a check to EPA for \$358,000, plus interest, in accordance with the procedures set forth in Paragraph 3, above, and not later than thirty (30) days after EPA's demand for such payment. Interest on the \$358,000 shall have begun to accrue on March 11, 2007, at the interest rate described in Section 107(a) of CERCLA.

16. **No Tax Deduction Allowed.** The cash payment required by this Settlement Agreement shall not be deductible for purposes of Federal income taxes. In addition, the City shall not capitalize into inventory or basis or deduct any costs or expenditures incurred in performing the Environmental Project for purposes of Federal income taxes.

17. **Failure to Comply.** Failure to comply with any of the terms or provisions in this Settlement Agreement shall be deemed a violation of the Settlement Agreement, and the City shall become liable for Stipulated Penalties pursuant to Paragraph 19, below.

18. **Dispute Resolution Procedure.** This section shall be the exclusive mechanism to resolve disputes arising under this Settlement Agreement. Any dispute that arises shall in the first instance be the subject of informal negotiations between the City and EPA Region 10/NOAA. The period for informal negotiations shall not exceed twenty (20) days from the time the dispute arises, unless it is modified by written agreement of the parties to the dispute. The dispute shall be considered to have arisen when one party sends the other party a written Notice of Dispute. In the event that the parties cannot resolve a dispute by informal negotiations, then the position advanced by EPA Region 10/NOAA shall be considered binding unless, within twenty (20) days after the conclusion of the informal negotiation period, the City invokes formal dispute resolution by serving EPA Region 10/NOAA with a written Statement of Position on the matter in dispute. Within twenty (20) days after receipt of the City's Statement of Position, EPA Region 10/NOAA may serve on the City its Statement of Position. Within seven (7) days after receipt of the EPA/NOAA Statement of Position, the City may submit a Reply. The EPA Region 10 Director of the Environmental Cleanup Office will issue a final decision resolving the dispute. The decision shall be final and binding upon the City.

19. **Stipulated Penalties.** In the event that the City fails to comply with the terms or provisions of this Settlement Agreement, the City shall be liable for Stipulated Penalties. The following Stipulated Penalties shall accrue per violation per day for any noncompliance:

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$1,000	1 st through 14 th day
\$5,000	15 th through 30 th day
\$8,000	31 st day and beyond

All penalties shall begin to accrue on the day after the complete performance is due or the day a violation occurs, and shall continue to accrue through the final day of the correction of the noncompliance or completion of the activity. All penalties accruing under this Section shall be due and payable to the United States within thirty (30) days of the City's receipt from EPA of

a demand for payment of penalties, unless the City invokes Dispute Resolution procedures under Section 18 above. EPA Region 10 may, in its unreviewable discretion, waive any portion of stipulated penalties that have accrued pursuant to this Settlement Agreement.

All payments of stipulated penalties made under this Section shall be identified as “stipulated penalties” and shall be made by certified or cashier’s check made payable to “EPA Hazardous Substance Superfund” and shall be deposited in the Thea Foss and Wheeler Osgood Waterways Problem Areas Special Account within the EPA Hazardous Substance Superfund to be retained and used to conduct or finance the response action at or in connection with the Thea Foss and Wheeler Osgood Waterways Problem Areas. Payment of stipulated penalties shall be sent to the following address:

US Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
PO Box 979077
St. Louis, MO 63197-9000

The City shall send copies of the check to the following two places:

Kelly Cole
Assistant Regional Counsel
Office of Regional Counsel
EPA Region 10
1200 Sixth Avenue, Suite 900
Mail Stop ORC-158
Seattle, WA 98101.

EPA Finance Center
MS-NWD
Cincinnati, OH 45268

20. **Public Statements.** Any public statement, written, in print, or on film, on a website, or in or on any other form of media, made by any City official, employee, contractor or any other representative of the City making reference to the Environmental Project shall include the following language: “This project was undertaken in connection with the settlement of an enforcement action taken by the United States Environmental Protection Agency for violations of CERCLA.” This language shall appear at least as prominently as the mention of the Environmental Project.

21. **Certification.** The City hereby certifies that, as of the date of the Settlement Agreement, it is not required to perform or develop the Environmental Project by any federal, state or local law or regulation; nor is the City required to perform or develop the Environmental Project by any other agreement, grant or as injunctive relief in this or any other case. The City shall not seek credit for the Environmental Project in any other enforcement action. The City further certifies that it has not received, and is not presently negotiating to receive, credit in any other enforcement action for this Environmental Project.

22. **Authority to Settle.** Each undersigned representative of the parties to this Settlement Agreement certifies that he or she is fully authorized by the party represented to enter

into the terms and conditions of this Settlement Agreement and to execute and legally bind that party to it.

Daniel D. Opalski, Director
Office of Environmental Cleanup
U.S. Environmental Protection Agency,
Region 10

Date: _____

Eric Andersen
City Manager
City of Tacoma

Date: _____

Craig O'Connor
Special Counsel for Natural Resources
Office of the General Counsel
National Oceanic and Atmospheric Administration

Date: _____